Administrative Function –
Outside Exclusion –
Discussion of licensing matters
Setting standards for regulated entities
Serving in advisory capacity
Within Exclusion –
Investigating patient complaints

Exceptions Permitting Closed Sessions – Other Law, §10-508(a)(13) – Medical review committee law

Closed Session Procedures – Written Statement – Generally – To be completed before meeting in closed session

Minutes – Contents – Practices in Violation – To contain meaningful summary of prior closed session

July 13, 2011

Michael S. Warshaw, Esq.
Complainant

Maryland Commission on Kidney Disease
Respondent

We have considered the allegations of Michael S. Warshaw, Esq. ("Complainant") that the Commission on Kidney Disease ("Commission") violated the Open Meetings Act ("the Act") with respect to its closed meetings and that the minutes of those closed sessions should be "made available to the public."

For the reasons stated below, we conclude that the Commission violated the Act by discussing in closed sessions matters not within the statute the Commission cited as authority before holding those closed sessions, or, put another way, by citing as authority for the closed sessions a statute having no bearing on the discussions. We further find that the Commission did not comply with the Act's requirements for closing a meeting. [1]

[1] We do not address the parties' contentions about the requirements of the Public Information Act, because we are only authorized to consider alleged violations of the Open Meetings Act. § 10-502.4 of the State Government Article ("SG"); see also 5 *OMCB Opinions* 102 , 103, n.2 (2007) (explaining Compliance Board's lack of authority to require disclosure of a file bearing on complaint made to the Board of Examiners of Psychologists).

I

Background

The Kidney Disease Program ("Program"), a program in the Department of Health and Mental Hygiene ("DHMH"), was established by statute "for the purpose of providing kidney disease treatment for qualified individuals who elect to enroll in the Program and agree to pay [certain] fees...." Health-General Article ("HG") § 13-301. The Commission, also established by statute, HG § 13-304, is a body composed of twelve members appointed by the Governor. HG § 13-305 –306. The parties do not dispute the Commission's status as a public body subject to the Act.

The Commission's many statutory functions include setting generally-applicable standards pertaining to the patients and the dialysis and transplant centers ("centers") participating in the Program. The Commission "adopt[s] physical and medical standards for the operation of dialysis and transplant centers," "adopt[s] reasonable medical standards for acceptance of an individual for treatment," evaluates the Program annually, and institutes and supervises education programs relating to chronic kidney disease. HG § § 13-307 - 308. The Secretary of DHMH must operate the Program "within the rules, regulations, and standards that the Commission and [DHMH] adopt...." HG § 13-309(1); *see also* HG § 13-311. The Commission sets the fees the centers pay into the Kidney Disease Fund "as an additional requirement for annual certification." The Commission administers that fund to cover the direct costs of fulfilling its statutory duties. HG § 13-310.1.

The Commission's functions also include addressing matters concerning individual centers and patients. First, "[t]he Commission, through the Department, shall certify the ... centers once the standards have been met as set forth in this subtitle." COMAR 10.30.01.07. A center denied certification appeals to the Commission, not to DHMH. *Id.*; *see also* COMAR 10.30.01.10. The Commission also surveys the centers and reviews their policies on discharging patients and managing abusive and dangerous patients and methods of implementing the policy. COMAR 10.30.01.05 (D). The Commission investigates and considers "complaints received from patients, providers, anonymous persons, and other interested parties including family members." HG § 13-308.

The Commission states that it meets quarterly, first in a session open to the public. After conducting general business at that session, the Commission conducts a vote to meet in closed session. The Commission states that it "provides a brief written statement, which is included in the minutes of its next public session, captioned 'Closed Session.'" The Commission further states

that it conducts its administrative function in its closed sessions, which it then summarizes in its open minutes. The summaries in the minutes provided to us by Complainant state:

> Closed session: Pursuant to Maryland State Government Annotated "10-508," on a motion made by [the Chairman], the Commission unanimously voted to close its meeting on [date] at [time], for the purpose of complying with the Maryland Medical Practice Act that prevents public disclosures about particular proceedings or matters.

The Commission thus apparently intends that this statement serve both as its closed-session statement and its closed-session summary.

The Commission has provided us with redacted minutes of various closed sessions. Under SG § 10-502.5(c), we maintain the confidentiality of sealed minutes provided to us by a public body. We therefore shall only describe these minutes generally, and as the need arises, in the discussion.

II

Discussion

A. Did the Commission's closed-session discussions fall within the administrative exclusion to the Act?

The Commission states: "[t]he Commission is a medical review committee, as defined by HO [Health Occupations] Article § 1-401, and is exempt from the Act when it recesses to carry-out its administrative function of discussing confidential certification matters at an investigatory stage pending before the Commission." This assertion implicates two separate grounds for holding a closed meeting under the Act: first, that the public body is performing an administrative function to which the Act does not apply; and, second, that a public body may close a meeting when it has properly claimed an exception under § 10-508, including the exception provided by SG § 10-508(a)(13) to comply with a specific statute. In this section, we discuss only the question of whether the Commission was performing an administrative function in its closed sessions.

The "administrative function" exclusion claimed by the Commission applies when the discussion in question meets three conditions. First, the discussion must not involve any of the activities set forth in SG § 10-503 (b), because the Act applies to those activities no matter what function the public

body is performing. 1 *OMCB Opinions* 13, 14 (1992). One such activity is the consideration of "granting a license or permit." SG § 10-503(b)(1); *see also* 1 *OMCB Opinions* at 14 (stating that, even if a county electrical board's discussions about a particular person's registration examination were administrative in nature, SG § 10-503 (b) (1) "nevertheless makes the Act applicable").

We conclude that the Commission's "certification" of a center to provide reimbursable services to Program recipients is the"granting [of] a license or permit" to that center to provide those services. To the extent that the Commission, not DHMH, is the entity granting a certification, as suggested by the fact that a center may appeal a denial to the Commission, the Commission's discussions about whether to grant a certification to a certain center are not exempt from the Act under the "administrative function" exclusion. [2]

Second, to fall within the administrative exclusion, the discussion must involve the administration of an existing law, or a rule, regulation, or bylaw of a public body. SH § 10-502(b)(1); *see also* 5 *OMCB Opinions* 42, 44 (2006). That condition requires that "there ... be an identifiable prior law to be

---

[2] The United States District Court for the District of Maryland, interpreting a federal regulation which referred to state "licensure requirements," stated:

> Certification is a condition precedent to reimbursement under the State Kidney Disease Program, but not to lawful operation of a dialysis facility which does not receive such reimbursement from the State. This court concludes that HEW's position that such certification is not a "licensure requirement" within the meaning of its regulations is neither an unreasonable interpretation of the regulations nor inconsistent with the [controlling] statute....

Mid Atlantic Nephrology Center, Ltd. v. Califano, 433 F. Supp. 23, 34 (D. Md. 1977)(footnotes omitted). Here, however, we interpret the Open Meetings Act, not the federal regulation at issue in *Mid Atlantic Nephrology,* and we do so mindful of the fact that the Act requires a public body to discuss public business in open session "except as otherwise expressly provided...." SG § 10-505. As observed in the Attorney General's *Open Meetings Act Manual,* p. 2-15 (7th ed., 2010), the Act does not contain an exception for occupational licensing proceedings, but the exceptions set forth in SG 10-508 would enable a public body to shield certain confidential licensing information from the public.

administered, *and* [that] the public body holding the meeting must be vested with legal responsibility for its administration." *Id.*

The third condition clarifies the meaning of "administer" by excluding five activities from the definition of "administrative function." *See* § 10-502(b)(2). One such non-administrative function is the "advisory" function"; another is the "quasi-legislative" function. *Id.* The "advisory function" means "the study of a matter of public concern or the making of recommendations on the matter, under a delegation of responsibility by ... law" or under such a delegation by public bodies exercising administrative and the non-administrative functions. SG § 10-502(c). The "quasi-legislative function" includes the process of adopting or changing "a rule, regulation, or bylaw that has the force of law." SG § 10-502(j)(1). In short, discussions about prospective policies and recommendations of future actions on subjects of public concern very seldom, if ever, qualify for the administrative function exclusion. *See, e.g.*, 65 *Opinions of the Attorney General* 396, 407 (1980) (concluding that the Open Meetings Act applied to the Thoroughbred Racing Board's award of racing dates under the applicable statutes, but not to its discussions on whether to allow racing on Sundays).

Here, the Commission's minutes suggest that it held closed-session discussions pertaining to its policies on its surveys, standardization in training of center staff, the roles and responsibilities of the centers' licensed staff and administrators, post-transplant care, Commission responses to media reports, discharge documentation, positions to take on proposed legislation, and home dialysis guidelines. We find that the Commission's consideration of those matters constituted an exercise of its advisory function of studying matters of public concern and within its statutory purview. To the extent that the Commission was addressing those matters as part of a process of adopting regulations, those discussions also were quasi-legislative in nature. Either way, the Commission's discussion of these topics did not entail the administration of "existing law" and could not be shielded from the public under the administrative function exclusion.

The Commission's discussions about patient complaints, however, did fall within the administrative exclusion, because the Commission was fulfilling its own statutory duty to receive and investigate complaints against dialysis and transplant centers in accordance with pre-existing standards. *See* 5 *OMCB Opinions* 102, 104 (2007) (finding that the Psychology Board, when addressing a complaint, was applying the existing law about the grounds for discipline and administering its statutory duty to "receive and investigate complaints"); *see also* 1 *OMCB Opinions, supra,* at 14 (finding that a county board of electrical examiners was fulfilling its administrative function when addressing complaints against electricians).

It may also be useful for us to address a function within the Commission's purview, but not necessarily performed in the closed sessions at issue here. As a general matter, the Commission's discussions on what recommendations to make to DHMH under a delegation by DHMH or by law would fall within the definition of an "advisory function," and thus outside of the definition of an "administrative function." For instance, under COMAR 10.30.01.10, the Commission "may ... recommend to the Secretary to revoke or suspend payments to a dialysis facility or transplant center" and may review the Secretary's "revocation or proposed revocation of certification and make an independent recommendation to the Secretary." Because the power to take those actions is vested in the Secretary, and not in the Commission, the exclusion would not apply. See 5 *OMCB Opinions* 60,66 (2006) (finding that an advisory commission charged with making recommendations was not performing an administrative function because the "legal responsibility" for applying the statute rested with Secretary of Transportation).

Whether the Commission is a "medical review committee" is not determinative of whether it was performing an administrative function in its closed meetings; although the "medical review" statutes pertain to the Commission's status, the Commission is not charged with administering them. That assertion, had it been properly claimed when the meetings were closed, would have gone instead to the exceptions set forth in SG § 10-508, and we discuss it next.

B. Did the exception claimed by the Commission pursuant to SG § 10-508(a)(13)apply to the discussions of the matters governed by the Act?

When the Act applies to a public body's consideration of a particular matter, a public body must discuss that matter publicly unless (a), one of the fourteen exceptions in SG § 10-508 applies, and (b), the public body has properly claimed that exception when voting to close the meeting. SG § § 10-505, 10-508. Here, the Commission claimed the exception provided by SG § 10-508(a)(13) to "comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter...."[3] The Commission's minutes cite "the Medical Practice Act," Title 14 of the Health Occupations Article ("HO"), as that "specific statutory ... requirement." In its response to Complainant's complaint, however, the Commission relies on a different statute, HO § 1-401, and states that its "references to the Medical Practice Act and its privilege for

[3] We infer the Commission's reliance on this particular exception from its reference to the Medical Practices Act. As discussed in Part C, the Commission's general citation to § 10-508 does not have the specificity required by § 10-508(d)(2)(ii).

nondisclosure of records ... should be taken to mean the Medical Review Committee privilege for nondisclosure of confidential medical review committee documents generated by the Commission in the course of performing its investigative administrative functions as a medical review committee." The Commission thus seems to have changed the basis on which it claims the exception provided by SG § 10-508(a)(13).

Under the Open Meetings Act, a public body meeting in a session closed under a § 10-508(a) exception must not discuss matters exceeding the exception claimed on the closing statement. § 10-508 (b). The applicability of any other exception is thus irrelevant. We have explained:

> The Act requires a public body to vote on the invocation of specific exceptions and its presiding officer to identify them in writing. These requirements seek to produce a public body's thoughtful consideration whether the reasonably anticipated discussion fits within the cited exceptions. Exceptions are not to be invoked without a bona fide basis.

3 *OMCB Opinions* 345, 348 (2003). Furthermore, a public body's rote and uninformative claim of an exception deprives the public, whether that public actually attends a meeting or participates by reading the closing documents later, of a meaningful opportunity to hold the members of the public body accountable for the decision to exclude the public. *See* 1 *OMCB Opinions* 191, 193 (1996) ("Members of a public body are accountable for their decision to hold a closed session, and part of their accountability is to make that decision before the public that is about to be excluded."). For these reasons, we have stated that a public body "may not advance, after the fact, an exception that was not properly presented and voted on at the time of a closing of a session." 1 *OMCB Opinions* 73, 78 (1994). In this case, the public body's citation to an inapplicable statute led also to the unfortunate result of putting a member of the public to the trouble of addressing that statute at length.

In short, a public body's statement of its basis for closing a meeting has consequences and is not to be treated as a mere formality. We find that the Commission violated the Act by discussing in closed meetings matters not required to be confidential under the authority its members then announced as the basis for excluding the public.

With respect to the Commission's claim that it could properly have closed the meeting under the statutes governing medical review committees, we encourage the Commission to carefully evaluate, before it cites those statutes on a closing statement and when it is considering whether to unseal minutes

of past meetings, whether those very precise statutes provide to the Commission the blanket confidentiality it claims for the many other functions it performs. We note that the Commission claims medical-review committee status under HO 1- 401(a)(3) and (b)(1), as a "regulatory board established by State ... law to license, certify, or discipline any provider of health care...." [4] Particularly, we encourage the Commission to consider whether the confidentiality attached to medical-review proceedings about specific patients or providers extends to the Commission's discussions about its broadly-applicable policies and standards and its positions on legislation.

C. Did the Commission comply with the Act's procedures for closing a meeting to the public?

The Commission's closing procedures did not comply with the Act: it apparently did not complete closing statements before meeting in closed session, as required by SG § 10-508(d), and its descriptions of the actions taken in closed session do not contain the information required by SG § 10-509(c)(2) and SG § 10-503 (c).

The Commission states that it will "consider adopting a form of statement for closing a meeting similar to that presented in Appendix C of the Attorney General's [*Open Meetings Act] Manual*." The form presented in Appendix C corresponds to the SG § 10-508(d) requirement that the closing statement include three pieces of information: (1) a citation to the SG § 10-508(a) exception relied on for closing the meeting; (2) the reason for closing the meeting; and (3) the topics to be discussed. Merely parroting the words of the particular exception on a closing statement does not satisfy § 10-508(d); instead, the presiding officer completing the form must provide meaningful information that apprises the public of the reason for closing the meeting without compromising the confidentiality of the session. 7 *OMCB Opinions* 131, 135 (2011). That same standard applies to the summary of the open session that is to be provided in the minutes of the subsequent open session. *Id*. Although the use of Appendix C for a closing statement is not mandatory, the completion of a statement containing that information is. The Commission should adopt that form or one similar to it, not merely consider such an action. The practices reflected in the minutes provided to us violate the Act.

We recognize that this public body addresses many issues involving the discussion of confidential medical information. Nonetheless, it is subject to

---

[4] Complainant suggests that HO § 1-401 applies only to committees reviewing "individual practitioners." HO § 1-401(a)(3) defines "provider of health care" as "any person who is licensed by law to provide health care to individuals." Under HO § 1-201(h), the term "person" includes entities.

the Open Meetings Act. Accordingly, before the Commission meets in closed session on matters not within the administrative function exclusion, its presiding officer must complete or sign a closing statement including the information required by the Act and must hold a public vote to close on the basis of the statutes and matters set forth in that statement. When the Commission closes a public session in order to exercise its administrative function, it must make the disclosures required by SG § 10-503(c); when it closes a meeting under SG § 10-508, it must make the disclosures required by SG § 10-509(c)(2). These disclosures must be meaningful and accurate.

III

Conclusion

The Commission, implicitly recognizing that its practices have been deficient, commendably states that it "continues to re-examine its practices and to institute corrective action where necessary." We encourage this endeavor. Here, an accurate disclosure of the Commission's basis for closing its meeting and a meaningful written description of the topics to be discussed would have served three purposes: requiring the members to give careful thought to whether the topics to be discussed truly had to be discussed out of the public eye; giving the presiding officer a tangible reminder of the permissible scope of the discussion; and apprising the members of the public, including Complainant, of the basis of the vote to close and of the topics discussed.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
Julio A. Morales, Esquire